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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOEL DRUM,

Petitioner,

v.

THE SUPREME COURT OF CALIFORNIA,
THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner

QUESTIONS PRESENTED

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) this Court held that a plaintiff pursuing a federal court action to declare a state statute unconstitutional, after having presented, and lost, that argument in state court, was impermissibly seeking to confer appellate jurisdiction in the district court. 263 U.S. at 416. Subsequently, in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court introduced the test for when a party was prohibited from seeking relief in federal district court from the effects of a state court decision: if the constitutional claims are "inextricably intertwined" with the state court's decision in a particular case. 460 U.S. at 483, fn. 16. Since that time there have been well over sixty published cases in the courts of appeals, alone (and conservatively three times that amount in the district court) that have considered and applied this test. In short, what has come to be known as the *Rooker-Feldman* doctrine has been the subject of a large number of decisions, and continues to be so.

In most of the cases it was determined that the doctrine prevented the plaintiff from seeking relief in federal court. In a smaller number, however, the courts have found *Rooker-Feldman* to be inapplicable when a party is not seeking to vacate the state court judgment. (*See, e.g., Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998) [federal

QUESTIONS PRESENTED – Continued

court plaintiff only seeks to prevent enforcement of the judgment]; *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486, 491-92 (3d Cir. 1997) [damages are being sought against a third party for engaging in fraudulent conduct that denied a state court litigant of due process]).

Petitioner suggests there is a significant number of cases that, under current interpretation of the "inextricably intertwined" test in *Feldman*, are wrongly dismissed, thus denying those plaintiffs an opportunity to obtain critical relief in federal court from the effects of a state court judgment: those who have lost (permanently or temporarily) the ability to pursue a livelihood due to a state court's revocation of a professional license through means that fail to comport with due process requirements. In Petitioner's case the denial of due process was in the form of a trial judge who was criticizing important expert witnesses *during opening statement*.

It is Petitioner's position that: (1) the courts of appeal have interpreted the *Rooker-Feldman* doctrine too broadly; or (2) the doctrine should not be construed to prohibit a party from claiming their due process rights were violated during a proceeding to revoke a professional license. Accordingly the questions presented in this petition are:

1. If a federal court plaintiff only seeks to vacate a state court decision that was the result of a denial of all required due process

QUESTIONS PRESENTED – Continued

rights, but does not pray for an order compelling a particular result in state court (as was the case in *Feldman*), are the claims in the federal court action "inextricably intertwined" with the state court decision?

2. Does the *Rooker-Feldman* doctrine prohibit a party, whose professional license was revoked or suspended as a result of a state court violation of due process rights, from seeking a determination that the state court violated due process, thereby entitling them to a new state court proceeding that includes all required due process protections?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Joel Drum, the Supreme Court of California and the State Bar of California. For the sake of consistency those defendants are named as the respondents herein. However, in his opposition to Respondents' motions to dismiss, Petitioner conceded that these were not proper defendants. Nevertheless, under *Ex Parte Young*, 209 U.S. 123, 159-60 (1907), the individual members of the relevant courts would be properly named as defendants.

If Petitioner were successful in this matter he would amend his complaint in the district court to eliminate the Respondents named herein and to add the chief justice of the California Supreme Court, and the individual members of the Review Department of the State Bar Court of California.

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By its very nature the federal courts are more sensitive to the constitutional rights of the country's citizens than are the state courts. In recognition of that fact Congress has authorized the district courts to consider, among other things, "civil actions arising under the Constitution." 28 U.S.C. § 1331. Of course, there are recognized limitations on the authority of a federal court to hear such lawsuits. Under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), federal courts will refrain from deciding sensitive Constitutional questions when state law issues may make the federal question moot. In *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts may not grant declaratory or injunctive relief that would interfere with state proceedings.

The rule of abstention from which this petition arises, of course, is the *Rooker-Feldman* doctrine. This Court has explained that the doctrine prohibits federal courts from "review[ing] and revers[ing] unfavorable state-court judgments." *Exxon Mobil Corp. v. Saudi Basic Industries*, 544 U.S. 280, 283 (2005). The Court, in *Exxon*, continued, however, that "The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries *caused by state-court judgments*." (Emphasis added) 544 U.S. at 284.

The Court of Appeals' cases have almost universally assumed that the term "caused" in the phrase

quoted above is actually synonymous with "arising from." *See, e.g., Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996); *Washington v. Wilmore*, 407 F.3d 274, 279 (4th Cir. 2005). In other words, *Rooker-Feldman* prohibits the exercise of federal-question jurisdiction whenever the federal-court plaintiff complains about anything that happened in the state court, even if the federal action does not seek to compel a particular result as to the merits in the state court action. Such an interpretation contrasts with the facts in the "cases of the kind from which the doctrine acquired its name." 544 U.S. at 284.

The opinion in *Rooker* does not state whether Rooker was the plaintiff or defendant in the original state court proceeding. And, although the opinion is not explicit as to this question, it appears he alleged in the state court that a statute which was the basis for his loss therein violated the contract clause of the Constitution, as well as due process and equal protection clauses of the Fourteenth Amendment, the issues raised in the federal court action. 263 U.S. at 414-15. The language used in the opinion ("to have a judgment . . . declared null and void, and to obtain other relief dependent on that outcome." 263 U.S. at 414) strongly suggests that Rooker sought to have the federal court declare that the state statute was unconstitutional and he must therefore prevail in the state court.

This Court held that the sole tribunal that could effect a change in the result of the state court judgment was the United States Supreme Court; that

such action on the part of a federal district court would constitute the impermissible exercise of appellate jurisdiction. 263 U.S. at 416.

In *Feldman,* the two petitioners originally asked the District of Columbia Court of Appeals to waive its rule that only graduates of law schools approved by the ABA could take the District of Columbia Bar Examination. 460 U.S. at 465-66 and 471-72. When the Court of Appeals denied that request they each filed an action in district court that sought a declaration that he either be admitted without taking the bar exam or be permitted to take the exam. 460 U.S. at 468-69 and 472-73.

This Court held that, while a district court had no authority to review judgments in state court proceedings, it could consider a "general challenge" to the constitutionality of the Court of Appeals' rule regarding bar admission and examination. 460 U.S. at 482-83. As noted above, it was in footnote 16 that the Court imposed the "inextricably intertwined" standard.

Subsequently this Court has expressed the rule as holding that:

> " . . . a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United State district court, based on the losing party's claim that the state judgment *itself* violates the loser's federal rights."

(Emphasis added) *Johnson v. De Grandy,* 512 U.S. 997, 1005-06 (1994).

For those such as Petitioner, who claim they lost a professional license due to procedural due process violations [App. at 21-22], there is no claim that the state judgment "itself" violated federal rights. In both *Rooker* and *Feldman* the district court plaintiffs were contending that there could be no circumstance under which the statute or rule could be constitutionally applied and the result in state court remain the same. In contrast, a party claiming that he or she was denied their due process rights, is not seeking to compel any particular result. It is conceivable (and may frequently be the case) that when due process (or any other constitutional requirement) is properly implemented, the license will again be revoked or suspended. In contrast to the relief sought in *Rooker* and *Feldman,* the district court will not be requiring any particular result as to the merits of the state court proceeding.

The current state of the jurisprudence involving the *Rooker-Feldman* doctrine applies it too broadly. Rather than limiting it "to cases of the kind from which the doctrine acquired its name" (*Exxon*, 544 U.S. at 284), the Court of Appeals still extends it to any objection to a state court judgment, even those that do not relate to the merits of the action.

In the context of a drivers license this Court has stated that the

> "continued possession [of a license] may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves

> state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."

Bell v. Burson, 402 U.S. 535, 539 (1971).

Given the ongoing (and often permanent) effects of a due process deprivation on a licensee, this Court should rule that, either *Rooker-Feldman* does not prohibit federal court challenges to a state court judgment based on procedural defects that violate the Constitution, or declare that the doctrine does not apply to state court proceedings that affect professional licensees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on December 28, 2008. App. at 1-2. The order of the District Court for the Central District of California accepting the recommendation of the United States Magistrate Judge and dismissing Petitioner's action was issued on September 19, 2006. App. at 4-5. The Report and Recommendation of United State Magistrate Judge was issued on August 21, 2006. App. at 6-19.

JURISDICTION

The Court of Appeals issued its opinion on December 28, 2007.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court and Court of Appeals pursuant to 28 U.S.C. §§ 1331 and 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Petitioner pursuant to 42 U.S.C. § 1983, which states as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of

> Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The jurisdiction of this Court to review decisions rendered in state courts is established by 28 U.S.C. § 1257 which states:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals."

Jurisdiction is conferred on the district court under 28 U.S.C. § 1331 which states:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

The Supreme Court of California and the State Bar of California asserted immunity from the suit

based on the Eleventh Amendment to the United States Constitution which states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

This is *not* the stereotypical case in which the plaintiff claims prejudice on the part of one or more judges simply because he or she failed to prevail. As will be shown presently, Petitioner's claim of prejudice[1] is based on the undisputed fact that his trial judge in the state bar court expressed negative views of the opinions of his expert *during opening statement*. No plaintiff in any case that Petitioner has discovered has based a claim of prejudice on such objective and indisputable facts.

Respondent The State Bar of California ("the State Bar") contended that petitioner, Joel Drum ("Drum"), an attorney, engaged in misconduct. It

[1] Notably, this critical allegation of the complaint is not even mentioned in the statement of the facts in the magistrate judge's recommendation. In contrast, the facts on which the disciplinary proceeding against Drum were based (which were completely irrelevant to the issue raised in the federal complaint) were extensively reviewed. App. at 8-12.

therefore initiated disciplinary proceedings against him. App. at 21. The judge who heard the disciplinary matter had prejudged Drum's defenses to the charges adversely *prior to the opening statement*. App. at 21-22. Drum was recommended for disbarment. App. at 11. However, the review department of the State Bar reduced that recommendation to a three year suspension. App. at 11.

The claim of prejudice was raised in appeals pursued before an interim reviewing court and respondent, California Supreme Court ("the Supreme Court"). App. at 22. The Supreme Court refused to consider the issue on its merits. App. at 22.

Drum filed an action in the district court under 42 U.S.C. § 1983. App. at 20-23. That action did not seek to compel any particular result as to whether, and to what extent, Drum should be disciplined; he only asked that the district court compel the Supreme Court and the State Bar, to grant him a new trial before a judge who had not determined the result before the trial began. App. at 22.

The Supreme Court and State Bar filed motions to dismiss based, *inter alia*, on the *Rooker-Feldman* doctrine. When the district court granted the motion [App. at 3] Drum sought review before the Ninth Circuit. In a short, unsigned Memorandum Decision the Court of Appeals found that *Rooker-Feldman* applied and affirmed the district court's dismissal.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE LOWER FEDERAL COURTS ARE APPLYING *ROOKER-FELDMAN* MORE BROADLY THAN IS REQUIRED

As noted above, in the majority of cases the lower federal courts have found that the *Rooker-Feldman* doctrine compelled dismissal of any case in which the federal plaintiff contends they were harmed as a result of the effects of a state court judgment, even if such judgment was the result of a Constitutional violation. *See, e.g., Bianchi v. Rylaarsdam*, 334 F.3d 895 (9th Cir. 2003) [doctrine prohibits plaintiff from seeking new appellate hearing without prejudiced judge as member of panel]. Yet a close examination of the rationale expressed in *Rooker* and *Feldman* discloses that the purposes that the cases intended to further would not be frustrated by allowing consideration of issues that are entirely collateral to the merits of the state court action.

In *Rooker,* this Court, in commenting on the remedy available, stated:

> "If the *decision* was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. . . . Under the legislation of Congress, no court of the United States other than this court could

> entertain a proceeding to *reverse or modify* the judgment for errors *of that character*."

(Emphasis added) 263 U.S. at 415-16.

In the context of *Rooker,* a "reversal" would have had the potential for the district court to declare the state statute to be other than as the state supreme court had interpreted it. It would have compelled a particular result as to the merits of the claim that Rooker originally presented in the state court. *Rooker* held that a party had the right to seek such a remedy, but only in this Court. Drum does not seek to have the district court issue any such order. Instead he, and those who can meet their burden of proof to show a denial of due process, only ask for a new hearing that provides the litigant with all of the due process rights that are granted to him under the Constitution; to avail himself of a forum "specially suited to the vindication of, federally created rights." *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615, 618 (2d Cir. 1955). This important purpose of the federal courts can be fulfilled without impinging on this Court's exclusive right to determine if state court decisions are wrong.

Nor would the rule Drum proposes require that the "inextricably intertwined" test be eliminated or even diluted. The test, in context, was stated by the Court as follows:

> "If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a

> judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state court decision."

460 U.S. at 482, fn. 16.

Obviously this test applies to more than "application[s] for admission to the state bar." In *Exxon,* this Court did not have to apply the "inextricably intertwined" analysis to reach its decision and, therefore, did not provide any further discussion of the subject. However, the Courts of Appeals have an extensive history of applying and synthesizing the test.

In one of the more widely-cited cases, *GASH Associates v. Village of Rosemont, Ill.*, 995 F.2d 726 (7th Cir. 1993), that court stated that application of the "inextricably intertwined" test is determined by asking the following question:

> " . . . is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party?"

995 F.2d at 728.

Drum suggests that such a formulation of the test provides greater breadth to the application of the *Rooker-Feldman* doctrine than was intended. Once more, this Court stated the doctrine to be limited and apply only to "cases brought by state-court losers complaining of injuries caused by state-court

judgments . . . and inviting district court review and rejection of those judgments." *Exxon*, 544 U.S. at 284. Although Drum is certainly a "state court loser" his complaint did not ask the district court to "review" the judgment; he only asked that tribunal to determine whether the judgment was based on a denial of due process. In such a situation it is not the judgment that is being reviewed but, rather, the process that lead to the judgment.

This type of distinction was recognized in *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997). In that case the plaintiffs sought to distribute voter guides that compared the positions of the candidates for state office. The Democratic Party was able to obtain state court injunctions prohibiting such distribution. The plaintiffs filed suit in federal court seeking damages. 122 F.3d at 194. In analyzing the applicability of *Rooker-Feldman* the court made the following observation:

> "A distinction must be made between actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court decisions resulted."

122 F.3d at 202.

Ultimately, the court upheld the dismissal because "[f]ederal review of the [plaintiffs'] claim would require the district court to decide the validity or invalidity of the state court's decision to issue the injunction." 122 F.3d at 203. In contrast though,

permitting Drum to pursue his action would not require the district court to decide whether or not he was properly disciplined. In *Jordahl* the plaintiffs would not have been content to have the district court return the case to the state court with the freedom to reimpose the injunctions. However, that is all Drum is asking: the State Bar would be free to seek disbarment again; it would be required, however, to provide an unbiased judge. In no way should this be viewed as requiring the type of interference with the state court proceedings as was prohibited in *Rooker* and *Feldman*. The question of whether due process was denied is not "inextricably intertwined" with that of whether Drum should be disciplined for the acts he was alleged to have committed.

By definition the phrase "inextricably intertwined" does not require all cases that are "intertwined" to be subject to *Rooker-Feldman* preclusion; only those that are "*in*extricable." That language shows that if the issue presented to the district court can be "extricated" from those raised by the pleadings in the state court the doctrine does not represent a bar to the federal courthouse. Clearly, such is the circumstance in all license revocation cases, such as Drum's.

As the party charged, Drum did not necessarily seek affirmative relief; he merely asked the state court to not discipline him. Though, of course, Drum implicitly wanted the court to provide him with his due process rights (which certainly included a judge who had not formed his opinion of witnesses before he

heard their testimony) that was not an issue presented when he was charged with misconduct. The only questions at trial were whether or not Drum did what he was accused of doing and whether he had any defense to that activity.

If Drum claimed that certain evidence was introduced in violation of his constitutional rights, and such evidence lead to his discipline, that *would* be an issue that was inextricably intertwined. Or, if he contended that the rule he was charged with violating was unconstitutionally applied to him, that issue would also be inextricably intertwined. In both examples the proceedings in state court could not take place without consideration of the federal issues. But that is not true with respect to the one federal issue Drum seeks to have the district court consider; that issue was never a part of the case, evidence or argument. It would not impinge on the judicial process in the slightest degree were he to be allowed to pursue the complaint.

One additional portion of the decision in *Feldman* supports Drum's interpretation. Every case that cites *Feldman* as the source of the "inextricably intertwined" test references footnote 16. Yet, that standard is repeated in the text of the opinion when it states: "These allegations (that the D.C. Court of Appeals acted arbitrarily and capriciously) are inextricably intertwined with the District of Columbia Court of Appeals' decisions, in judicial proceedings, to deny the respondents' *petitions*." (parenthetical and emphasis added) 460 U.S. at 486-87. The Court, itself, was

acknowledging that it looked to the merits of the state court case in determining that the issues were inextricably intertwined. This discloses the narrow interpretation originally intended by the Court and reaffirmed in *Exxon*.

Admittedly, almost every Circuit has applied the doctrine beyond the merits of the case to any complaint that relates to whether the judgment was the product of the denial of due process rights. Although this Court has never rejected this interpretation, it has also never adopted it, nor even had occasion to consider the question. (*See Exxon*, 544 U.S. at 287-88) for a summary of all of this Court's cases that referred to *Rooker-Feldman*, but only in passing). In the two most direct considerations of the issue, *Exxon* and *Lance v. Dennis*, 546 U.S. 459 (2006), however, none of the Courts' of Appeals decisions that resulted in a dismissal were cited with approval and one, *Moccio v. New York State Office of Court Admin.*, 95 F.3d 195 (2d Cir. 1996), was cited as an example of a case that applied the doctrine too broadly.

To be clear, Drum is relying on–not contesting–the inextricably intertwined test. Whatever he might argue in a vacuum, he recognizes the validity of the standard. He only contends, however, that a claim that a judgment was the result of procedural activities that violated due process, is not inextricably intertwined; as a result a district court has jurisdiction to consider the claim.

II. ADOPTION OF THE RULE PROPOSED BY DRUM WILL NOT IMPOSE UNDUE BURDENS ON THE JUDICIARY

Of course, whenever a rule that restricts a category of cases from being filed in a particular venue is removed, there is a concern that the "floodgates of litigation" will open. After all, with a formerly-closed avenue of recourse opened to litigants, they will be expected to course down that thoroughfare without hesitation. However, a review of the history of such cases since *Feldman* strongly indicates that the increase will, at most, be a trickle, rather than a flood.

One scholar analyzed the cases between just 1991 and 1998 that considered the application of the *Rooker-Feldman* doctrine. During that period, she found, over five hundred cases were dismissed based on the doctrine. Sherry, Suzanne, *Federalism in the Trenches: The Rooker-Feldman Doctrine in Action,* 74 ND Law R. 1085, 1088 (1999). Thus, even with the current restrictive interpretation of the doctrine, hundreds of litigants have still found a way to gain entry to the courthouse. Of course, their presence there was brief, but the point is that parties have filed suit in federal court despite the prohibition. Though the rule Drum proposes will certainly not stem that tide, there is no reason to believe it will cause an increase. The only effect will be to allow a relatively few, meritorious matters to get beyond the threshold and at least as far as the courtroom door.

It also might be argued that such suits will jeopardize the independence of the judiciary. After all, Drum's complaint is directed against the conduct of a judge. Once more, however, experience post-*Feldman* shows this would be unlikely to cause any significant problem.

One could open almost any volume of the Federal Supplement or Federal Appendix since 1983 and find at least one case in which a plaintiff has alleged that one or more judges were prejudiced and that the adverse decision in state court was the result of such bias. There is no evidence that these cases have had any effect on the independence of the judiciary at all. True, were the Court to change the rule in the manner Drum proposes such cases could not be dismissed immediately. However, most of them have no more evidence in support of the contention of prejudice than the mere fact that the judge or judges rejected the plaintiff's argument in state court. Since such evidence, alone, will not meet the burden of proving prejudice (*Lopez v. Behles*, 14 F.3d 1497, 1501 (10th Cir. 1994)), most cases will be disposed of almost as promptly, and with no more action required on the part of counsel for the judge. If that is all the evidence available to the plaintiff, it will take very little time and effort to prepare a successful motion for summary judgment.

On the other hand, those cases in which the evidence that due process has been violated is strong will be allowed to proceed. Those who have lost as a result of the denial of Constitutional rights will have

a forum that is "specially suited to the vindication of, federally created rights." *Paduano*, 221 F.2d at 618. The federal courts will be doing the job charged to them by Congress and those who have been harmed will have a practical remedy.

III. ALTERNATIVELY, THE COURT SHOULD FIND THAT LICENSE REVOCATION CASES ARE EXCEPTED FROM THE *ROOKER-FELDMAN* DOCTRINE

One of the most eloquent explications of the protections afforded litigants by the federal courts is contained in *Paduano*, 221 F.2d 615:

> "First, the primary policy for investing the federal courts with 'arising under' jurisdiction, [is] to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights."

221 F.2d at 618.

For various reasons state courts are often more concerned with enforcing their laws than in determining whether there have been any Constitutional shortcomings. As in this case, an accused finds that arguments of a Constitutional dimension are given short shrift, the state court jurists being relatively unconcerned with whether a finding of a violation was the result of a Constitutional infirmity. If the state chooses to prevent an individual from pursuing the occupation they have labored to obtain, they

should not be able to ignore Constitutional mandates and then, when the accused seeks to vindicate those rights in federal court, claim the accused had an "opportunity" (whether that opportunity was "fair" is not their concern) to present this issue on appeal. If this important property right is to be denied, the accused should at least have an opportunity to establish the violation of the federal right in the state court in a truly independent forum.

In any state court case that involves the suspension of a professional license the proceeding will invariably be initiated by the licensing agency or its representative; in contrast to the situation in *Exxon*, 544 U.S. 280, there will not be any opportunity to seek early federal relief. Thus, contrary to the situation faced by all others who may wish to make a Constitutional claim with respect to a state court action, relief in the district court will never be available. For this reason it is appropriate–and not violative of the rationale for the *Rooker-Feldman* doctrine–to treat such cases differently.

Feldman held that the federal court plaintiffs were precluded from challenging the Court of Appeals' denial of their petition because such denial was judicial in nature. 460 U.S. at 479. One court has questioned, however, whether a decision by the highest judicial authority of a state on an administrative matter (the right to become a member of the bar) can be considered to have acted in a judicial capacity. " . . . when a court makes a decision concerning the legality of its own actions, it may be too biased to

justify abstention by the federal courts even if its actions are considered adjudicative." *Guarino v. Larsen*, 11 F.3d 1151, 1159, fn. 4 (3d Cir. 1993). Admittedly, the court continued by pointing out that this conflicted with the facts in *Feldman* in which the decision was considered judicial. But perhaps, with the benefit of over 25 years of experience, the need to modify the rule, without doing violence to the principle on which it was based, warrants reconsideration.

This is not to say that *Feldman* should be overruled. In the context of a true judicial decision the rationale of that case is valid. However, given that in California, the Supreme Court has the primary authority over the admission, discipline and regulation of attorneys (*Hoffman v. State Bar of California*, 113 Cal.App.4th 630, 635 (2003)) it is apparent that there is truly a problem with allowing the ultimate prosecuting authority to also determine if it effectively engaged in any action that was proscribed by the Constitution. That no one found fault with a judge who was disparaging witnesses during opening statement [App. at 21-22] clearly draws into question whether this court correctly assumes that states are as capable of interpreting federal laws as are the federal courts.

IV. NONE OF THE ALTERNATE GROUNDS IN SUPPORT OF RESPONDENTS' MOTIONS JUSTIFY DISMISSAL

The preceding point notwithstanding, Drum acknowledges that the Court will not consider these arguments if, ultimately, he would still be denied relief due to the validity of the Respondents' alternate grounds for dismissal. *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (9th Cir. 1997). While Drum concedes that these issues are not of sufficient magnitude to warrant this Court's consideration on the merits, he includes this section to establish that the granting of this petition will not produce a result in which the Court later concludes that the petition was improvidently granted.

A. The Eleventh Amendment Does Not Prohibit a Suit Under the Facts Alleged in the Complaint

The report of the magistrate judge, which was adopted by the district court, concluded that, in addition to the *Rooker-Feldman* doctrine, the complaint was barred by the Eleventh Amendment. App. at 15-17. As noted in the "Parties to Proceedings Below" section above, Drum conceded that the Supreme Court and State Bar, as an entity, were possessed with immunity under the Eleventh Amendment, but asserted it would not bar a suit against the individual members in their official capacity. However, the Report concluded that suit against the individual

members would still be prohibited. App. at 16. That conclusion is in error.

The Report stated the Eleventh Amendment would preclude an amended suit against individual defendants, citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) and *Alabama v. Pugh*, 438 U.S. 781 (1978). App. at 17. However, a close reading of those cases discloses no prohibition under the facts that would likely be alleged in an amended complaint.

While in *Pennhurst* this Court observed prior cases had held that a suit against individual state officials is barred if "the state is the substantial party in interest" (465 U.S. at 101), the Court also acknowledged an exception if "a suit challenging the constitutionality of a state official's action is not one against the State" (465 U.S. at 102), citing *Ex Parte Young*, 209 U.S. 123 (1908). In *Young,* this Court permitted an action against a state attorney general that sought to enjoin him from enforcing a state statute that allegedly violated the Constitution. As summarized in *Pennhurst* "the theory of the case was that an unconstitutional enactment is 'void' and therefore does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 102.

The likely allegations of an amended complaint would conform to the terms of the exception: the individual members of the California Supreme Court and State Bar Court acted in violation of the Constitution

in upholding the determinations of a judge who was actually prejudiced. Consequently, an action solely for injunctive relief against those state actors is not proscribed.

The second case cited in the Report, *Alabama v. Pugh*, actually supports Drum's claim. That case held that an action against the State of Alabama and its Board of Corrections had to be dismissed as to those particular defendants; however, the decision did not require dismissal of the "numerous individual defendants in the case." 438 U.S. at 782.

B. Judicial Immunity is Not Available Under the Facts Alleged in the Complaint

In 1984 this Court held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). And prior to that, the Court specifically held that the chief justice of a state supreme court was subject to a suit for injunctive relief under 42 U.S.C. § 1983. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 737 (1980).

Admittedly, in 1996 Congress amended 42 U.S.C. § 1983 to allow for liability "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was

unavailable." Although this amendment might appear to prohibit the within action, the only case Drum has discovered that discusses this issue holds to the contrary.

In *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194 (3d Cir. 2000), the Court of Appeals considered the effect of the 1996 amendment. After reviewing the legislative history, the court concluded that the purpose of the amendment was to overrule *Pulliam*'s authorization for an award of attorneys fees incidental to the grant of an injunction, "not to alter the landscape of declaratory relief." 201 F.3d at 198. Thus, judicial immunity does not bar an action seeking prospective injunctive relief. Since the amendment Drum proposes would be limited to such relief, judicial immunity would not be available to the defendants.

C. Collateral Estoppel is Not Available as a Defense Under the Facts Alleged in the Complaint

Relying primarily on *Takahashi v. Board of Education*, 783 F.2d 848 (9th Cir. 1986), the Supreme Court claimed that the doctrine of collateral estoppel barred the complaint. However that case involved an evaluation of the "primary right theory" used by California courts to determine if a prior action has a preclusive effect on a subsequent lawsuit. The court concluded that an earlier state court suit and a later

federal court action involved the same primary right: a contractual right to employment. 783 F.2d at 851.

In this case the "primary right" involved in the State Bar Court proceeding was whether Drum's conduct with respect to his clients warranted discipline. However, as noted above, the "primary right" involved in the underlying suit is that to an impartial jurist. Thus, *Takahashi*, alone, does not prohibit the underlying lawsuit.

Furthermore, this Court has held that collateral estoppel will not be applied if it would interfere with the vindication of federal rights.

> "Morever, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights."

Haring v. Prosise, 462 U.S. 306, 313-14 (1983).

Respondents do not deny that Drum had a clear right to an unbiased judge. For the purpose of the motion to dismiss Respondents were bound to concede that the judge was prejudiced. Obviously the state courts have shown an unwillingness to protect this right. As such, this Court's prior decisions approve of federal court involvement.

CONCLUSION

For the forgoing reasons Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL DRUM, Plaintiff-Appellant, v. THE SUPREME COURT OF THE STATE OF CALIFORNIA; et al., Defendants-Appellees.	No. 06-56472 D.C. No. CV-06-00214-JFW MEMORANDUM* (Filed Dec. 28, 2007)

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Submitted Dec. 20, 2007**

Before: GOODWIN, WALLACE, and HAWKINS, Circuit Judges.

Joel Drum, a California attorney who was suspended from the practice of law for misconduct, appeals pro se from the district court's judgment dismissing for lack of subject matter jurisdiction his action under 42 U.S.C. § 1983 alleging due process violations arising out of his State Bar disciplinary

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's jurisdictional dismissal based on the *Rooker-Feldman* doctrine. *Noel v. Hall,* 341 F.3d 1148, 1154 (9th Cir. 2003). We affirm.

The district court properly concluded that the *Rooker-Feldman* doctrine barred Drum's action because it is a "forbidden de facto appeal" of suspension proceedings, and raises constitutional claims that are "inextricably intertwined" with prior state court decisions. *Id.* at 1158; *see also Mothershed v. Justices of the Supreme Court,* 410 F.3d 602, 607-08 (9th Cir. 2005) (holding that district court lacked subject matter jurisdiction pursuant to *Rooker-Feldman* doctrine to adjudicate attorney's challenge to his State Bar disciplinary proceedings).

Drum's remaining contentions are unpersuasive.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOEL DRUM, Plaintiff-Appellant, v. SUPREME COURT OF STATE OF CALIFORNIA; et al., Defendants-Appellees.	No. 06-56472 D.C. No. CV-06-00214-JFW **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 12/28/07

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL DRUM, Plaintiff, v. THE SUPREME COURT OF CALIFORNIA and the STATE BAR OF CALIFORNIA, Defendants.	No. CV 06-214 JFW (FFM) ORDER (1) ACCEPTING AND ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND (2) GRANTING DEFENDANTS' MOTIONS TO DISMISS WITHOUT LEAVE TO AMEND (Filed Sep. 19, 2006) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

Pursuant to 28 U.S.C. §636, the Court has made a *de novo* review of those portions of the Report and Recommendation of the United States Magistrate Judge to which objections have been made.

IT IS ORDERED that: (1) the Court accepts and adopts the Report and Recommendation and (2)

defendants' Motions to Dismiss are granted and plaintiff's complaint is dismissed without leave to amend.

DATED: 9/19/06

/s/ John F. Walter
JOHN F. WALTER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL DRUM, Plaintiff, v. THE SUPREME COURT OF CALIFORNIA and the STATE BAR OF CALIFORNIA, Defendants.	No. CV 06-214 JFW (FFM) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** (Filed Aug. 21, 2006)

This Report and Recommendation is submitted to the Honorable John F. Walter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff commenced the instant action on January 12, 2006, pursuant to 42 U.S.C. § 1983. Plaintiff alleges that the Supreme Court of California and the State Bar of California violated his constitutional rights in conducting disciplinary proceedings against him. Plaintiff further alleges that the California Supreme Court violated his constitutional rights in denying his Petition for Writ of Review of the decision of the Review Department of the State Bar Court.

Essentially, plaintiff contends that the judge of the State Bar Court who presided over the hearing was biased against him and had prejudged his defenses. Plaintiff seeks damages in the amount of $82,500.00 and a declaration that the decision of the State Bar Court to suspend him as an attorney is void and unenforceable.

Defendant State Bar of California filed its Motion to Dismiss on March 9, 2006. The State Bar also filed a request for the Court to take judicial notice of the Decision and Order of Involuntary Inactive Enrollment filed on July 7, 2003 by the State Bar Court Hearing Department; the Opinion on Review filed April 7, 2005 by the State Bar Court Review Department; and the Order Denying Petition for Review filed September 28, 2005 by the Supreme Court of the State of California.[1]

Defendant, Supreme Court of California, also filed a Motion to Dismiss on March 9, 2006. On April 6, 2006, plaintiff filed a combined opposition to both motions. The State Bar and the Supreme Court of California filed separate replies to plaintiff's opposition on April 24, 2006. Having reviewed the documents filed in connection with the motion, the Court deems the matter appropriate for decision without

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[1] The Court has taken Judicial Notice of the July 7, 2003 Decision and Order of Involuntary Inactive Enrollment, the April 7, 2005 Opinion on Review, and the September 28, 2005 Order Denying Petition for Review.

oral hearing pursuant to Federal Rule of Civil Procedure 78.

STATEMENT OF FACTS

In 1993, respondent was hired by Farmers Insurance Exchange (Farmers) to represent it in subrogation matters pursuant to a contingent fee agreement. In July 1998, Farmers fired respondent and requested the return of its approximately 175 files. Respondent refused to return the files until an agreement was reached for his compensation. Farmers, through counsel, made several further demands for return of the files, citing relevant authority showing that retention of the files was unethical. Failing in these attempts, Farmers sued respondent in October 1998.

Shortly thereafter, Farmers filed an application for a temporary restraining order to compel respondent to return the files. The superior court granted the application and ordered respondent to return all of the files. Respondent appealed. In May 1999, the Court of Appeal dismissed the appeal and imposed sanctions against respondent in the amount of $3,320 for filing a frivolous appeal solely for the purpose of delay. Respondent's petition for review to the California Supreme Court was denied in July 1999. Shortly thereafter respondent returned all but 16 of the files, which he claimed he did not have to return because they were closed files.

Respondent continued to represent Farmers in the subrogation cases after he was fired. Although respondent eventually paid the sanctions imposed against him, he did not pay them timely and did not report them to the State Bar. Farmers incurred litigation expenses of approximately $81,000 in order to recover its files "and continue litigating with respondent."

In 1995, Midland Risk Insurance Company (Midland) hired respondent to represent it in subrogation matters pursuant to a contingent fee agreement. In February 1999, Midland fired respondent and requested the return of its files. Respondent refused to return the files until an agreement was reached for his compensation. Midland, through counsel, made further demands for return of the files, citing relevant authority showing that retention of the files was unethical. Failing in these attempts, Midland sued respondent in March 1999.

Shortly thereafter, Midland filed an application for a writ of possession, which was granted by the superior court. Respondent was ordered to return all of Midland's files. In April 1999, Midland and respondent stipulated to a court order requiring respondent to return all the files. Respondent returned the files. Respondent continued to represent Midland in the subrogation cases after he was fired. Midland paid $8,865 in attorney fees and $988 in costs to recover its files from respondent.

In both the Farmers and Midland matters respondent admitted that he did not return the files and that he continued to represent the clients after he was discharged. In the Farmers matter, respondent admitted that he did not report the sanctions to the State Bar, that he did not pay the sanctions timely, and that he did not return the 16 files.

In the Farmers matter, respondent was found culpable of violation rule 3-700(D)(1) of the Rules of Professional Conduct for failing to return promptly client files and property upon his termination; section 6068, subdivision (o)(3), for failing to report within 30 days to the State Bar the imposition of judicial sanctions; section 6103 for failing to obey court orders by failing to return the Farmers files as ordered, and by failing to pay timely the sanctions; and section 6104 for appearing as an attorney for Farmers without authority after he was fired. In the Midland matter, respondent was found culpable of violating rule 3-700(D)(1) for failing to return promptly client files and property upon termination; and section 6104 for appearing as an attorney for Midland without authority after he was fired.

In mitigation, the hearing judge found that respondent had practiced for 22 years without prior discipline. (Std. 1.2(e)(i), Rules Proc. of State Bar, tit IV, Stds. for Atty. Sanctions for Prof. Misconduct (std.).) In aggravation, the hearing judge found that

> respondent engaged in multiple acts of misconduct (std.1.2(b)(ii)); that his misconduct was surrounded by bad faith and dishonesty in that his failure to return the files was done in bad faith for the sole purpose of extracting money from the clients, and in that respondent was dishonest in testifying that he did not know he had to report the imposition of judicial sanctions to the State Bar (std. 1.2(b)(iii))); that respondent's misconduct harmed his clients and the administration of justice in that the clients had to pay significant amounts to get the files back and because judicial time was wasted dealing with frivolous actions (std. 1.2(b)(iv)); and that respondent demonstrated indifference toward rectification of, or atonement for, the consequences of his misconduct in that respondent is unrepentant (std. 1.2(b)(v)).[2]

The hearing judge recommended disbarment. On review plaintiff argued that he was entitled to a new trial because the hearing judge was biased against him. Independently reviewing the record, the Review Department of the State Bar Court found no merit to plaintiff's arguments. Nonetheless, the Review Department concluded that the record did not support disbarment. Accordingly, the Review Department modified plaintiff's discipline, placing plaintiff on probation and requiring restitution.

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[2] Opinion on Review of the Review Department of the State Bar Court, 2-5 (footnotes omitted).

The Supreme Court of California denied plaintiff's Petition for Writ of Review.

DISCUSSION

Both defendants assert that this Court does not have jurisdiction to review the State Court disciplinary decision and that, in any event, the Eleventh Amendment bars the action. In addition, the California Supreme Court argues that 42 U.S.C. § 1983 does not apply to it, in that it is not "a person" for purposes of that statute; that it cannot be held vicariously libel for the actions of the State Bar; that plaintiff's claims are barred by judicial immunity; and that the action is barred by *collateral estoppel.*

A. This Court Lacks Jurisdiction to Review the California Supreme Court's Order Suspending Plaintiff from the Practice of Law.

It is well established that a "United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings." *Worldwide Church of God v. McNair,* 805 F.2d 888, 890 (9th Cir. 1986); *see District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16 (1923). Under this "*Rooker-Feldman*" doctrine, a district court lacks jurisdiction over a claim amounting to a "de facto appeal" of a state court judgment, which "asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks

relief from a state court judgment based on that decision." *Noel v. Hall,* 341 F.3d 1148, 1163-64 (9th Cir. 2003). The proper court in which to obtain such review is the United States Supreme Court, by petition for writ of certiorari. *Feldman,* 460 U.S. at 476; 28 U.S.C. § 1257. "This doctrine applies even when the challenge to the state court decision involves federal constitutional issues." *Worldwide Church of God,* 805 F.2d at 891 (citations omitted).

Rooker-Feldman applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* 544 U.S. 280, 284 (2005); *see also Noel v. Hall,* 341 F.3d at 1 163 (*Rooker-Feldman* applies: (1) where the federal plaintiff "complain[s] of harm caused by a state court judgment that directly withholds a benefit from (or imposes a detriment on) the federal plaintiff based on an allegedly erroneous ruling by that court;" or (2) where the federal plaintiff "complain[s] of a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff is one of the litigants"). Plaintiff alleges that the State Bar Court was biased against him and prejudged his defenses. Plaintiff seeks an order deeming the State Bar Court's suspension order "void and unenforceable." (*See* Complaint, Prayer, ¶ 1). Plaintiff contends he does not seek review of the State Bar Court's decision, but simply a new hearing

before a different judge. (*See* Plaintiff's Opposition, p. 6). According to plaintiff, the only relevant issue is whether the judge who presided over his hearing should have been disqualified (Plaintiff's Opposition, p. 6). Although plaintiff avoids mention of the California Supreme Court's order imposing the suspension, it is that order, and that order alone, that caused plaintiff's suspension. *See In re Rose,* 22 Cal. 4th 430, 442 (disciplinary decision of the State Bar Court "simply constitutes a recommendation regarding the ultimate discipline to be imposed by this court, and no disbarment or suspension may occur until this court's entry of its own order"). Hence, plaintiff's attack on the validity of the State Bar Court's ruling in reality constitutes an attack on the California Supreme Court's jurisdiction and decision, and therefore constitutes the kind of *de facto* appeal *Rooker-Feldman* prohibits. *See Craig v. State Bar of California,* 141 F.3d 1353, 1354 (9th Cir. 1998) (*Rooker-Feldman* barred applicant's challenge to Committee of Bar Examiners' refusal to allow him to take a revised oath in conformity with his religious views, where California Supreme Court denied petition for review, and plaintiff sought federal court order requiring Committee to modify oath); *Rosenthal v. Justices of the Supreme Court of California,* 910 F.2d 561, 567 (9th Cir. 1990) (*Rooker-Feldman* barred attorney's challenge to fairness of State Bar proceedings which the California Supreme Court had reviewed); *see also Bianchi v. Rylaarsdam,* 334 F.3d 895, 898-902 (9th Cir. 2003) (*Rooker-Feldman* barred claim for order requiring California Court of Appeal

to grant Plaintiff a new hearing with a different panel of appellate justices in order to obtain a more favorable result on the merits; federal court could not grant relief sought without "'undoing' the decision of the state court").

Plaintiff attempts to distinguish the foregoing authority on the ground that he was allegedly subjected to an unfair *process* as opposed to an erroneous ruling. The only authority plaintiff cites for this contention is a dissent in *Bianchi v. Rylaarsdam,* 334 F.3d at 903. Not only was plaintiff's contention rejected by the majority in *Bianchi,* but also by the decision in *Rosenthal v. Justices of the Supreme Court of California,* 910 F.2d at 567 ("[T]o the extent Rosenthal challenges the fairness of the hearings, they have already been reviewed by the California Supreme Court. That court has concluded that the bar's recommendation was proper. Only the United States Supreme Court, and not this court, has jurisdiction to look behind that decision.").

B. Neither the State Bar Nor the California Supreme Court Is Subject to Suit in This Court

"[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. . . . This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 100 (1984) (citations omitted).

The Supreme Court of California is an agency of the state vested with the state's judicial power. See Cal. Const., Art. VI, § 1; *see also Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1110 (9th Cir. 1987).

The State Bar is a constitutionally created public corporation which acts as a judicial state agency and administrative "arm" of the California Supreme Court, and is subject to the California Supreme Court's "expressly reserved power over admission and discipline." *See In re Attorney Discipline System,* 19 Cal. 4th 582, 590, 599-601, 79 Cal. Rptr. 2d 836, 839-40, 846-47, 967 P.2d 49 (1998); Cal. Const., Art. IV, section 9. Because the State Bar and California Supreme Court are state agencies, the Eleventh Amendment bars Plaintiff's claims against these entities in this Court. *See also Hirsh v. Justices of Supreme Court of California,* 67 F.3d 708, 715 (9th Cir. 1995); *Lupert v. California State Bar,* 761 F.2d 1325, 1327 (9th Cir. 1985).

Plaintiff concedes in his opposition that the Eleventh Amendment bars his action "against the named defendants." (*See* Opposition, P. 1). However, plaintiff contends" that he should be granted leave to amend his complaint to allow him to name the Chief Justice of the California Supreme Court individually. Plaintiff claims that the Eleventh Amendment would not bar an action against the Chief Justice for a mandatory injunction compelling him to issue a new order vacating the decision of the State Bar Court and to afford plaintiff a new trial before an unbiased

judge. Plaintiff's premise that such injunctive relief is not barred by the Eleventh Amendment is incorrect. The Eleventh amendment not only bars plaintiff's claims to the extent plaintiff is seeking monetary damages, but also any claims regarding the type of equitable relief he seeks. *See Pennhurst State School & Hosp.*, 465 U.S. at 100 (1984) ("this jurisdictional bar applies regardless of the nature of the relief sought."); *see also Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (*per curiam*) (Eleventh Amendment bars claim for injunctive relief against Alabama and its board of corrections). Here, plaintiff does not seek to restrain a state officer from enforcing an unconstitutional enactment; rather, plaintiff seeks to compel a state official to reverse a prior ruling. In the context of plaintiff's disciplinary proceedings before the State Bar, plaintiff's request for injunctive relief is not the type that is permitted by the Eleventh Amendment.

C. The California Supreme Court is Not "A Person" for Purposes of 42 U.S.C. § 1983

In *Will v. Michigan Dept of State Police*, 491 U.S. 58, 64-65, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that states and state agencies are not persons subject to civil rights suits under 42 U.S.C. § 1983. As discussed above, the California Supreme Court is a state agency. Thus, plaintiff cannot proceed against the California Supreme Court on his Section 1983 claim.

D. Remaining Defenses

Given the foregoing the Court need not address the additional defenses of judicial immunity and *collateral estoppel* raised by the California Supreme Court.

CONCLUSION

Based on the foregoing, the Court finds that the Complaint fails to state a federal civil rights claim on which relief may be granted against any defendant. Moreover, plaintiff's request to add individual officers of the California Supreme Court and/or State Bar would be futile. Since it does not appear to the Court that the pleading deficiencies in plaintiff's complaint are capable of being cured by amendment, the Court is recommending that plaintiff's federal civil rights claim be dismissed without leave to amend.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) granting defendants' Motions to Dismiss plaintiff's complaint without leave to amend; and (3) directing that judgement be entered dismissing this action with prejudice.

DATED: August 21, 2006

/s/ Frederick F. Mumm
FREDERICK F. MUMM
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

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Plaintiff

UNITED STATES DISTRICT COURT
COUNTY OF LOS ANGELES

JOEL DRUM, Plaintiff, vs. THE SUPREME COURT OF CALIFORNIA; THE STATE BAR OF CALIFORNIA, Defendants.	)	CASE NO. COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff alleges:

1. This is an action for deprivation of constitutional rights under color of state law brought pursuant to 42 U.S.C. 1983 for remedies for defendant's deprivation of plaintiff's civil rights. This Court has original jurisdiction of this civil action pursuant to 28 U.S.C. 1331.

2. At all times herein mentioned plaintiff was, and now is, a citizen of the United States and resides at Los Angeles County, California. From May 31,

1980 through July 10, 2003 plaintiff was licensed to practice law in the State of California.

3. At all times herein mentioned defendant, The Supreme Court of California, was the head of the Judicial Branch of the State of California and, among other things, was responsible for the discipline of attorneys admitted to practice law in the State under its authority.

4. At all times herein mentioned defendant, The State Bar of California, was a public corporation. Among other things the Supreme Court has delegated its disciplinary duties to the State Bar.

5. Prior to January 22, 2003 the State Bar initiated disciplinary proceedings against Plaintiff. The trial of those proceedings was conducted in the Hearing Department of the State Bar Court and took place between January 22, 2003 and January 24, 2003. Judge Alban I. Niles presided over that trial.

6. After the matter was submitted Judge Niles rendered a decision that recommended Plaintiff be disbarred. Plaintiff is currently suspended from the practice of law until, at least, December 28, 2006.

7. Prior to the commencement of the trial Judge Niles had pre-judged Plaintiff's defenses in the matter, in violation of Plaintiff's due process rights under the United States Constitution. Specifically, among other things, during opening statement Judge Niles was belittling the anticipated testimony of Plaintiff's

expert, whose testimony was critical to Plaintiff's defense to the charges against him.

8. Plaintiff has pursued all remedies available to him under the laws of the State of California. Among other things, the Supreme Court, refused to consider Plaintiff's due process claim on its merits.

9. As a result of defendants' actions Plaintiff has been denied a property right – the pursuit of his chosen occupation – in a manner that is violative of the United States Constitution. Unless this Court intervenes Plaintiff will continue to be denied the right to earn his living in the manner which he has previously chosen.

10. As a further result of defendants' actions Plaintiff has suffered financial harm in an amount which is currently estimated to be $82,500.

WHEREFORE, plaintiff requests judgment against defendant as follows:

1. For a declaration that the decision that resulted in the Plaintiff's suspension as an attorney was made by a judge who was actually prejudiced against Plaintiff and, as a result, such decision is void and unenforceable as being violative of Plaintiff's due process rights under the United States Constitution.

2. For damages in the minimum amount of $82,500.

3. For reasonable attorneys fees;

4. For costs of suit incurred herein;

5. For such other and further relief as the Court deems proper.

Dated: January 12, 2006

JOEL DRUM
Plaintiff